SUPREME COURT, U. S.

JUL 1 1968

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No. 142

# In the Supreme Court of the United States

OCTOBER TERM, 1968

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JAMES ROBERT GROGAN III, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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ERWIN N. GRISWOLD,
*Solicitor General,*

FRED M. VINSON, JR.,
*Assistant Attorney General,*

BEATRICE ROSENBERG,
SIDNEY M. GLAZER,
*Attorneys,*
*Department of Justice,*
*Washington, D.C. 20530.*

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### OPINIONS BELOW

The initial opinion of the court of appeals (Pet. B-1—B-7) is reported at 386 F.2d 300. The opinion of the court of appeals on the motion for reconsideration of the order denying the petition for rehearing (Pet. C-1—C-3) is not yet reported.

### JURISDICTION

The judgment of the court of appeals was entered on November 28, 1967. A petition for rehearing was

denied on December 28, 1967. Thereafter, the court of appeals granted leave to file a motion for reconsideration of the denial of rehearing and on April 2, 1968 denied reconsideration. On April 19, 1968, Mr. Justice Black extended the time for filing a petition for a writ of certiorari to June 1, 1968, and the petition was filed on May 31, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether the district court was justified in finding at petitioner's first trial that the jury was unable to agree upon a verdict, and therefore in declaring a mistrial.

## STATEMENT

Petitioner was convicted in the United States District Court for the Middle District of Georgia of receiving stolen helicopter blades belonging to the United States, in violation of 18 U.S.C. 641, and, together with James Davis of a conspiracy to violate this statute. He was sentenced to concurrent terms of imprisonment for five years. The court of appeals affirmed.

1. In 1964, James Offutt, a soldier who issued, and kept records of, aircraft parts at Fort Benning, Georgia (R. 172), sold helicopter parts belonging to the Army to petitioner, the manager of the Shelby, North Carolina municipal airport. Other soldiers including co-defendant Davis and Clifford Holliday assisted Offutt in these transactions (*e.g.*, R. 173, 174, 177, 183-184, 187). Petitioner had made a list of the

parts that he wanted (R. 201, 642, 646-647, 653) and purchased them at 15 percent of their regular price (R. 200).

Between January 1964 and October 1964, Offutt made seven separate transfers of helicopter parts to petitioner (R. 178, 186-187, 200, 210, 213, 217-219, 222-223). In one of these transactions, Offutt and Davis transferred helicopter blades from a military truck to a civilian truck driven by Bobby Packard, an employee of petitioner (R. 200-208, 222).[1] Petitioner than resold these blades to the owner of an Arizona helicopter business (R. 61-65). Petitioner paid for the parts by Western Union money orders payable to Offutt, Offutt's wife, Davis and Holliday (*e.g.*, R. 194-196, 159-162) and also paid Offutt in cash (*e.g.*, R. 208). Petitioner paid Offutt a total of more than $50,000 (R. 225).

Testifying in his own defense, petitioner admitted buying the parts but claimed that Offutt represented himself as a buyer of surplus parts (R. 474 *ff.*).

2. Petitioner was initially tried with Davis and Bobby Packard in a trial which began on March 28, 1966. The jury began its deliberations on March 31, 1966 at 5:15 p.m. At 10:00 p.m., the jury returned to the jury box. The judge, after stating that "I gather that the jury has not yet been able to reach a verdict in this case," cautioned the foreman not to reveal how the jury stood numerically. The court instructed the jury that each defendant was entitled to separate

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[1] On another occasion, Packard also picked up an engine from Offutt (R. 222-223).

consideration, and that it could return different verdicts for the different defendants and different verdicts for each defendant on the separate counts (R. 851-852). The court charged (R. 832):

> * * * I want to make it clear to you that at any time you reach unanimous agreement in a verdict with regard to any defendant in this case, you may enter that verdict with regard to that defendant on the indictment and return that verdict into court, even though you may still be in disagreement with regard to the other defendants in the case.
>
> If you do that, if that is the situation and if you should return a verdict with regard to some one defendant or some two defendants, without being in complete agreement with regard to the other defendant or defendants remaining, concerning whom you have not reached unanimous agreement, then I will decide after you return that verdict what should be done, whether I should require you to deliberate further with regard to the defendant or defendants concerning whom you have not reached agreement, or whether I would simply declare a mistrial with regard to that defendant or those defendants concerning whom you have not reached unanimous agreement.

The court concluded by reiterating that the jury was "at liberty to return" the verdict whenever it reached unanimous agreement and that if it did so the court would decide what would be "the best thing to do concerning the features with respect to which you have not reached unanimous agreement." The court then told the jury to "deliberate further to see if you are able to reach agreement" (R. 854).

The defendants excepted to these additional instructions on the ground that they were a "dynamite charge of the most explosive type" which indicated "to the jury that they should compromise the fate of these men and perhaps trade it out for one guilty count." Counsel for petitioner emphasized that the late hour and the long day made the charge harmful to the defendants (R. 854-856).

Ten minutes later, the jury returned a verdict of not guilty on all of the counts against co-defendant Packard (R. 854-857). The court then declared a mistrial as to petitioner and Davis (R. 857), finding that the jury was unable to agree upon a verdict (R. 15).

Petitioner and Davis were tried a second time on the same indictment. No claim of double jeopardy was made at trial, but on appeal petitioner contended that the first jury had been prematurely discharged and that the second trial subjected him to double jeopardy. The court of appeals held that the trial judge did not abuse his discretion in declaring a mistrial at the first trial (Pet. App. B-5, C-1-2).

## ARGUMENT

The holding of the court of appeals that the judge at the first trial was justified in concluding that the jury was unable to agree and therefore in declaring a mistrial, is correct, and does not warrant further review. As this Court said in *Gori* v. *United States*, 367 U.S. 364, 368: "Where, for reasons deemed compelling by the trial judge, who is best situated intel-

ligently to make such a decision, the ends of substantial justice cannot be attained without discontinuing the trial, a mistrial may be declared without the defendant's consent and even over his objection, and he may be retried consistently with the Fifth Amendment." A trial judge has broad discretion to determine whether the circumstances make it appropriate thus to terminate a trial, and the record shows that the judge here properly declared a mistrial.

When the judge did so at 10:20 p.m., the jury had been deliberating, except during whatever dinner recess it had and the court's supplemental charge, since 5:15 p.m. Although the trial had taken four days, the jury was required to resolve only a single narrow question in determining petitioner's guilt or innocence —whether petitioner knew that the aircraft parts he had purchased were stolen. The jury quickly brought in a verdict of acquittal of a co-defendant after the judge in his supplemental charge had instructed it "to see if you are able to reach agreement." Petitioner had challenged the supplemental instructions as a "dynamite charge of the most explosive type," and undoubtedly would have objected even more strongly if the court had given the so-called "Allen charge" (see *Thaggard* v. *United States*, 354 F. 2d 735 (C.A. 5)).

In all the circumstances, the judge was justified in concluding that further deliberation by the jury would be unlikely to produce agreement. He was not required, as petitioner urges (Pet. 10), to question the jury as to the likelihood of their agreeing; he properly inferred the lack of such likelihood from all the cir-

cumstances, and was not required to confirm his conclusion through a specific inquiry.[2]

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
*Solicitor General.*

FRED M. VINSON, JR.,
*Assistant Attorney General.*

BEATRICE ROSENBERG,
SIDNEY M. GLAZER,
*Attorneys.*

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[2] Since the trial court properly declared a mistrial, it is unnecessary to consider whether petitioner may properly raise the issue in view of his failure to file a pretrial motion to dismiss the indictment on the ground of double jeopardy or to raise the issue at trial.

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